

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 DON KING PRODUCTIONS, INC.,

4 Plaintiff,

5 v.

CIVIL NO. 04-2292 (RLA)

6 TORRES LIQUOR STORE, et al.,

7 Defendants.

8 ORDER IN THE MATTER OF DISPOSITIVE MOTIONS

9
10 Various defendants have moved the court to enter summary
11 judgment and to dismiss the instant complaint. The court having
12 reviewed the arguments presented hereby disposes of the petitions as
13 follows.

14 PROCEDURAL BACKGROUND

15 Plaintiff instituted this suit seeking damages under three (3)
16 separate legal provisions, i.e., the Federal Communications Act of
17 1934, as amended, 47 U.S.C. §§ 553 and 605 and the Copyright Act of
18 1976, 17 U.S.C. § 101, *et seq.*

19 According to the complaint, plaintiff is the producer and the
20 holder of the copyrights and other exclusive worldwide rights of the
21 closed-circuit telecast of the **December 13, 2003** Championship boxing
22 match between Bernard Hopkins and William Joppy, including undercard
23 or preliminary bouts at closed-circuit locations such as theaters,
24 arenas, bars, clubs, lounges, restaurants and the like throughout
25 Puerto Rico. Plaintiff further alleges that it produced the event for
26 the purpose of distributing for a commercial gain, the closed-circuit

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3 broadcast of the aforementioned match to various business
4 establishments throughout Puerto Rico.5 **MOTION FOR SUMMARY JUDGMENT**6 Various defendants have moved the court to enter summary
7 judgment in their favor contending that plaintiff's copyrights are
8 limited to a videotape of the boxing event which was registered
9 subsequent to the transmission of the fight and hence, no cause of
10 action lies against them in this suit. Defendants, however, raise no
11 arguments for dismissal regarding the claims asserted under 47 U.S.C.
12 §§ 553 and 605 in their summary judgment request.13 Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
14 ruling on summary judgment motions, in pertinent part provides that
15 they shall be granted "if the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the
17 affidavits, if any, show that there is no genuine issue as to any
18 material fact and that the moving party is entitled to a judgment as
19 a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
20 Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
21 1999). The party seeking summary judgment must first demonstrate the
22 absence of a genuine issue of material fact in the record.
23 DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
24 issue exists if there is sufficient evidence supporting the claimed
25 factual disputes to require a trial. Morris v. Gov't Dev. Bank of
26 Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.

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2 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S.
3 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
4 it might affect the outcome of a lawsuit under the governing law.
5 Morrissey v. Boston Five Cents Sav. Bank, 54 F. 3d 27, 31 (1st Cir.
6 1995).

7 It is undisputed that the copyright registration of the event at
8 issue in this litigation is posterior to the alleged infringements
9 which took place on **December 13, 2003.**¹

10 Although, as a general rule, registration is a prerequisite for
11 instituting copyright infringement suits,² an exception is provided
12 "when the work in question consists of sounds, images, or both, if
13 and to the extent such works are first fixed simultaneously with
14 their transmission. To redress infringement of such works, an action
15 may be filed not only prior to registration of the work, but prior
16 even to the time the work is first fixed. It is only required that
17 the copyright owner register the work **within three months after its**
18 **first transmission**". Melville B. Nimmer and Davis Nimmer, 2 *Nimmer on*
19 *Copyright*, § 7.16[B][3] (emphasis ours) (footnotes omitted). See
20 also, 17 U.S.C. § 411(b).

22 ¹ According to a Certificate submitted by defendants, on **January**
23 **16, 2004**, plaintiff filed a petition for registration of the Video
24 Tape of the Boxing Match with the Copyright Office.

25 ² See, 17 U.S.C. § 411. However, even in those cases of post-
26 registration plaintiffs have been allowed to recover actual damages
and infringer's profits but not statutory damages. X-It Prods., LLC
v. Walter Kidde Portable Equip., Inc., 227 F.Supp. 494, 528 (E.D.Va.
2002).

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2 Further, statutory damages and attorney fees will be allowed
3 even if the registration is procured subsequent to the transmission.
4 "[T]he requirement of registration to obtain the benefit of
5 attorney's fees and statutory damages is subject to two exceptions.
6 First, as regards infringements of works consisting of sounds,
7 images, or both, first fixed simultaneously with their transmission,
8 there is no such limitation on statutory damages and attorney's fees.
9

2 *Nimmer on Copyright*, § 7.16[C][1] (footnotes omitted).

10 Conclusion

11 It appearing that the pertinent registration was effected 34
12 days subsequent to the transmission of the event, it falls within the
13 aforementioned exception. Accordingly, the Motion for Summary
14 Judgment filed by RAMON MORALES-CINTRON and JAVIER MERCADO [Group 24]
15 (docket No. 222) is **DENIED**.³

16 MOTION TO DISMISS

17 A group of defendants have also moved to dismiss the complaint
18 alleging that plaintiff has failed to sufficiently plead claims under
19 47 U.S.C. §§ 605, 553 and 17 U.S.C. § 101.

20 In disposing of motions to dismiss pursuant to Rule 12(b)(6)
21 Fed. R. Civ. P. the court will accept all factual allegations as true
22 and will make all reasonable inferences in plaintiff's favor.

24

³ See also, defendants' Memorandum of Law (docket No. 223);
25 Informative Motion and Submitting Exhibits (docket No. 225) and Response
26 (docket No. 230). Plaintiff's Motion to Strike Exhibit (docket 229) is
DENIED.

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2 Frazier v. Fairhaven Sch. Com., 276 F.3d 52, 56 (1st Cir. 2002);
3 Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267
4 F.3d 30, 33 (1st Cir. 2001); Berezin v. Regency Sav. Bank, 234 F.3d
5 68, 70 (1st Cir. 2000); Tompkins v. United Healthcare of New England,
6 Inc., 203 F.3d 90, 92 (1st Cir. 2000).

7 Our scope of review under this provision is a narrow one.
8 Dismissal will only be granted if after having taken all well-pleaded
9 allegations in the complaint as true, the Court finds that plaintiff
10 is not entitled to relief under any theory. Brown v. Hot, Sexy and
11 Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) cert. den. 116
12 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st
13 Cir. 1994). Further, our role is to examine the complaint to
14 determine whether plaintiff has adduced sufficient facts to state a
15 cognizable cause of action. Alternative Energy, 267 F.3d at 36. The
16 complaint will be dismissed if the court finds that under the facts
17 as pleaded plaintiff may not prevail on any possible theory.
18 Berezin, 234 F.3d at 70; Tompkins, 203 F.3d at 93.

19 No argument has been presented in the motion to dismiss
20 addressing the adequacy of the § 553 claim so there is no need to
21 discuss this particular provision. Additionally, assuming its
22 relevancy, we have already disposed of the argument that post-
23 registration is fatal to the copyright claim.

24 As to the claim asserted under § 605, we agree with the
25 arguments set forth by plaintiff in its Response to Motion to Dismiss
26

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2 (docket No. 221) that this cause of action was adequately pled.
3 Contrary to what defendants contend, an "aggrieved person" under the
4 statute does not have to be a copyright holder. Rather, it is defined
5 as "any person with proprietary rights in the intercepted
6 communication by wire or radio, including wholesale or retail
7 distributors of satellite cable programming". § 605(d)(6).

8 Further, we find that the allegations in the pleading
9 sufficiently adduce that defendants "(1) intercepted or aided the
10 interception of proprietary satellite programming and (2) divulged or
11 published, or aided in the divulging or publishing of, the
12 programming transmitted by the plaintiff" the essential elements of
13 a § 605 claim. DirectTV v. Deskin, 363 F.Supp.2d 254, 258 (D.Conn.
14 2005). See also, California Satellite Sys. v. Seimon, 767 F.2d 1364,
15 1366 (9th Cir. 1985).

16 **Conclusion**

17 It appearing that plaintiff has adequately pled the fundamentals
18 of a cause of action under § 605, the Motion to Dismiss (docket No.
19 220) is **DENIED**.⁴

20 IT IS SO ORDERED.

21 San Juan, Puerto Rico, this 30th day of August, 2006.

22 _____
23 S/Raymond L. Acosta
RAYMOND L. ACOSTA
24 United States District Judge

25 _____
26 ⁴ See, Response to Motion to Dismiss (docket No. 228).